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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte W. DENVER CHRISTOPHER and RICHARD PISANO JR.

Appeal 2008-3825
Application 10/062,561
Technology Center 1600

Decided: September 25, 2008

Before, DEMETRA J. MILLS, LORA M. GREEN, and
RICHARD M. LEBOVITZ *Administrative Patent Judges*.

MILLS, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134. The Examiner has rejected the claims for obviousness. We have jurisdiction under 35 U.S.C. § 6(b).

The following claim is representative.

1. A fragrance or flavor composition consisting essentially of a fragrance effective amount of a fragrance compound, a flavor effective amount of a flavor compound or mixture thereof, said fragrance compound and/or flavor compound containing at least one color component sensitive to electromagnetic radiation, and an amount of a natural antioxidant that is substantially inert with respect to said fragrance compound, flavor compound or mixture thereof in an amount sufficient to substantially stabilize said fragrance or flavor composition against color-degradation, wherein said natural antioxidant is an extract of a member of the family Labiatae or an active antioxidant ingredient thereof.

Cited References

Chang	U.S. 3,950,266	Apr. 13, 1976
Todd, Jr.	U.S. 5,079,016	Jan. 7, 1992
Bank et al.	U.S. 6,306,450 B1	Oct. 23, 2001

Grounds of Rejection

Claims 1, 3-6, 8-11, 13-17, and 19-22 stand rejected under 35 U.S.C. § 103(a), for obviousness over the combination of Chang, Todd, and Bank.

DISCUSSION

Background

The present invention relates to a fragrance and flavor composition and a method for preventing or diminishing the loss of color in products produced by the food, fragrance and flavor industries. (Spec. 1.)

The Examiner finds that:

Chang et al (Patent '266) discloses natural antioxidant stabilizing flavor composition and preventing deterioration of oils and fats in foods products (abstract, col 12, lin [sic] 15-20 and table 7). The natural antioxidant is from the herb rosemary extract (col 4, lin [sic] 25-30), generally known in the art to be from the Labiatae family.

(Ans. 4.)

The Examiner further finds that Todd discloses effective color stabilization of carotenoid compositions using annatto, tomato, carrot compositions, in combination with Labiatae or tea extract (source of natural antioxidant). (Ans. 5.) Todd also discloses fragrance or flavor compositions with natural antioxidant and enhancement of color stabilization (abstract, col. 16, ll. 40-65), and discloses Labiatae as the antioxidant (col. 3, l. 67; col. 5, l. 25; col. 7, l. 15 and col. 12, ll. 35-55). (Ans. 5.) Todd discloses the stabilization of tomato juice with rosemary extract (col. 13, ll. 5-40) but does not disclose the specific chemical anti-oxidant ingredient in the rosemary extract as rosmarinic acid. (Ans. 5.)

Thus, the Examiner relies on Bank which discloses the prevention of the development of off-flavor and off odors in storage-stable, citrus compositions including citral as the flavoring agent and a plant extract of the Labiatae family as the stabilizing agent (abstract; col. 5, ll. 1-5; col. 9, ll. 5-35). Active ingredients in the stabilizing plant extract include rosmarinic acid (Bank, col. 4, ll. 35-44; col. 5, ll. 55; col. 7, ll. 15-20; and col. 8, ll. 25-30). (Ans. 5.)

The Examiner concludes that:

One of ordinary skill in the art would be motivated to prepare an anti-oxidant fragrance or flavor composition wherein the color deterioration is stabilized by the use of a natural antioxidant from rosemary extract in sufficient amount as described in prior art cited (Patent '266, Patent '016 or Patent '450). One of ordinary skill would expect to obtain fragrance or food composition with appealing characteristics such as longer shelf or storage life without unpleasant rancid, off-flavor, off-odor (and loss of taste in case of foods) due to antioxidant action of the ingredients from the rosemary extract.

(Ans. 5-6.) We find no error with the Examiner's prima facie case of obviousness.

Where the prior art, as here, gives reason or motivation to make the claimed invention, the burden then falls on an Appellants to rebut that prima facie case of the Examiner. Such rebuttal or argument can consist of any other argument or presentation of evidence that is pertinent. *In re Dillon*, 919 F.2d 688, 692-93 (Fed. Cir. 1990).

Appellants contend that:

Chang does not mention color-stabilization and is limited to the treatment of oils and fats wherein color-stabilization is usually not a factor. The present claims are drawn to the stabilization of fragrance and/or flavor compounds having at least one color component sensitive to electromagnetic radiation against color degradation. Thus, the claims specify “an amount (of stabilizer) sufficient to substantially stabilize said fragrance or flavor composition against color degradation”. Since Chang does not disclose the stabilization of anything against color degradation and, further, since the only materials disclosed by Chang are fats and oils that do not contain color components sensitive to electromagnetic radiation, the reference cannot be said to suggest the claimed invention.

(Br. 4.) Appellants argue that Chang does not disclose a stabilizing effective amount of natural antioxidant which is an extract of a member of the family Labiatae, as claimed. (Br. 5.) Appellants argue that “Todd also requires the presence of a ‘non-ionic surface active agent’ to achieve color stabilization.” (Br. 8.) Appellants argue that Bank does not discuss color-stabilization and does not disclose the amounts of stabilizer to achieve such an effect. (Br. 9.)

We are not persuaded by Appellants’ argument. Non-obviousness cannot be established by attacking references individually where the rejection is based upon the teachings of a combination of references. *In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). The test of obviousness is “whether the teachings of the prior art, taken as a whole, would have made obvious the claimed invention.” *In re Gorman*, 933 F.2d 982, 986 (Fed. Cir. 1991). For the reasons discussed in detail above, we conclude that the combined teachings of the cited references would have suggested the invention as claimed.

In the present case, Todd discloses color stabilization using an effective amount of antioxidant of the Labiatae family (abstract, col. 16, ll. 40-65; col. 3, l. 67; col. 5, l. 25; col. 7, l. 15 and col. 12, ll. 35-55), and Bank discloses that a stabilizing active agent from the Labiatae family is rosmarinic acid. Bank further discloses that citral flavoring may be stabilized with rosmarinic acid (Bank, col. 4, ll. 35-44; col. 5, ll. 55; col. 7, ll. 15-20; and col. 8, ll. 25-30). Thus, while Chang may not teach a color stabilizing effective amount, Todd does teach a color stabilizing effective amount of Labiatae. While Bank does not disclose an effective amount of rosmarinic acid for color stabilization (it teaches flavor stabilization), Todd

describes an effective amount of Labiatae for color stabilization. The specification indicates that a flavor and fragrance effective amount is in parts per billion or parts per million. (Spec. 5.) Bank teaches a flavor stabilizing effective amount in parts per million (Bank, col. 9, ll. 5-10 and claim 9.)

In addition, we do not agree with Appellants that Todd teaches away from the present invention which does not rely on surface active agents to achieve color stabilization. (Br. 9.) Todd teaches that “the use of natural antioxidant e.g., Labiatae or tea extract or a tocopherol, alone to produce surprisingly effective color-stabilization” (abstract). Thus, while addition of surface color stabilization, this does not detract from the teaching of Todd that Labiatae extract can alone produce surprisingly effective color stabilization. Thus we are not persuaded by Appellants arguments.

We do not find that Appellants have rebutted the Examiner’s prima facie case of obviousness. The obviousness rejection of claims 1, 3-6, 8-11, 13-17, and 19-22 is affirmed.

SUMMARY

The obviousness rejection is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

clj

Appeal 2008-3825
Application 10/062,561

MILES & STOCKBRIDGE PC
1751 PINNACLE DRIVE
SUITE 500
MCLEAN, VA 22102-3833